BRIEF IN SUPPORT OF PETITION.

Statement of Facts.

In 1932, the petitioner was in the business of producing window displays and other advertising material (R. 32). In that year it started the production and sale of jig-saw puzzles (R. 31). On June 21, 1932, Section 609 of the Revenue Act of 1932 (Appendix, p. 15) became effective (R. 27). On November 14, 1932, the Treasury Department adopted a ruling, S. T. 567 (Appendix, p. 17) to the effect that jig-saw puzzles were subject to the 10 per cent. tax imposed by that section (R. 23). In January, 1933, the petitioner was advised by a Deputy Collector that jig-saw puzzles were subject to the tax (R. 62). During the period between February 27, 1933, and December 29, 1933, the petitioner paid taxes on jig-saw puzzles to the defendant Corwin, amounting to $13,-792.26, and to the defendant Rasquin, amounting to $9,331.00 and interest (R. 9).

On January 15, 1935, petitioner filed with the Collector of Internal Revenue, a certain claim for refund of manufacturer's excise tax paid from January, 1933, to December, 1933 (Deft.'s Ex. "A" in Evidence, R. 57; Offered in Evidence, R. 40). The claim did not specify the amount claimed, and stated that the claim was filed in order to prevent the tolling of the statute of limitations. It set out the fact that the ruling of the Commissioner of Internal Revenue to the effect that jig-saw puzzles are other than children's games is contrary to fact and law; that the puzzles were not games and if conceded to be games were in all instances children's games. It then proceeded to state facts to support the contention that

jig-saw puzzles were not games. This claim for refund was disallowed by letter of August 13, 1935 (Deft.'s Ex. "B" in Evidence, R. 58; Offered in Evidence, R. 40). The reasons stated are that jig-saw puzzles are games, and that jig-saw puzzles containing more than 50 pieces are not children's games.

There the matter rested until February 4, 1937, when the petitioner filed a claim for refund, the one now relied upon (Pltff.'s Ex. "4" in Evidence, R. 53 offered in Evidence, R. 36). This claim asserted that a jig-saw puzzle was not a game and that

> "Taxpayer further relies on the decision rendered for the Appellant in the case of *Philip J. Aronson, Trustee, Plaintiff, Appellant* v. *Thomas W. White, individually and as Former Collector of Internal Revenue, Defendant, Appellee* (U. S. Circuit Court of Appeals for the First Circuit, No. 3171, January 5, 1937) wherein it was held that a jigsaw puzzle was not taxable under Section 609 of the Revenue Act of 1932."

This claim, considered on the merits, was disallowed on August 4, 1937, for the sole reason that this Court had granted certiorari in the *Aronson* case (301 U. S. 675). (Pltff.'s Ex. "6" in Evidence, R. 56). On November 8, 1937, this Court in its decision in the *Aronson* case (302 U. S. 16) held that jig-saw puzzles were not taxable.

On January 10, 1939, the petitioner started this action upon the refund claim disallowed on August 4, 1937 R. 1). The action was commenced within the two year period after disallowance of the claim prescribed by statute (R. S. 3226, Appendix, p. 15). The defend-

ants in their answer set up as a complete defense, the filing and disallowance of the claim for refund, disallowed August 13, 1935, and the fact that this action was commenced more than two years after that date (R. 10-12). The District Court for the Eastern District of New York gave judgment for the petitioner (R. 92-93). The Circuit Court of Appeals, Second Circuit, reversed, and ordered the complaint dismissed on the defense of the statute of limitations.

THE FIRST GROUND.

The decision of the Circuit Court, Second Circuit, in this case is in direct conflict with the decision of the Circuit Court, First Circuit, in *Pacific Mills* v. *Nichols*, 72 F. (2d) 103.

Pacific Mills involved facts remarkable by their similarity to the present case. There, the taxpayer filed a claim for refund alleging seven separate grounds. The claim was disallowed. Subsequently, within the time prescribed by statute for the filing of claims it filed another claim which reasserted the sixth item in the first claim. After the second claim was rejected, the taxpayer commenced an action upon the second claim. The suit was timely as to that second claim, but not as to the first claim. The District Court dismissed the action as barred by the statute of limitations. The Circuit Court, First Circuit, reversed, and held that the taxpayer's action based upon the second claim was proper.

The Circuit Court, Second Circuit, in the case at bar, assumed that both claims were filed on the same ground, a contention which the petitioner does not

admit, and based its decision on that theory. Then it attempted to distinguish the facts in *Pacific Mills* but admitted the possibility of identity of fact.

> "The plaintiff relies on *Pacific Mills* v. *Nichols*, 1 Cir., 72 F. 2d 103. In that case the court took the view that the second claim for refund raised different grounds and so was not a mere repetition of the first claim. On such a basis the *Pacific Mills* case is different from the present one. If it stands for more than this, we cannot follow it." *Einson-Freeman* v. *Corwin*, 112 F. 2d 683, 4.

The distinction between the two cases attempted to be drawn grows out of a possible misapprehension of the language of the opinion in *Pacific Mills*. At page 105 of the opinion in that case the court clearly states:

> "the plaintiff filed another claim for refund, the one now relied on, which was in effect a reassertion of the sixth item in its original claim."

At page 107, in distinguishing *Pacific Mills* from another case, *B. Altman* v. *United States* (Ct. Cl.) 40 F. 2d 781, the Circuit Court, First Circuit states:

> "in the *Altman* Case the ground on which the second claim was based was identical with that of the first claim and had been considered and decided in connection therewith. In the present case, as above stated, that appears not to have been the fact."

The opinion makes it plain that the second claim was a reassertion of part of the first claim, and then merely points out that the two claims were not *identical*.

An examination of the record in *Pacific Mills* bears this out. The first claim for refund will be found at page 15 and the second claim at page 79 of that record. The sixth item in the first claim reads:

> "The cost of goods sold was greater than the amount stated on the return. In particular the Corporation contends that the market price of cottom [*sic.*] and wool fixed by the Department as of December 31, 1918 was greater than the actual market price."

The pertinent part of the second claim reads:

> "Taxpayer contends that its closing inventory of wool for the year 1918 should be valued at British Issue Prices rather than at the figures fixed by the Department. If this were done, the reduction of inventory and income for the year 1918 would result in a reduction of tax considerably larger than $425,446.72, which is the amount of additional tax paid for the year 1918 on April 4, 1923, or less than four years prior to the filing of this claim for refund."

In other words both claims made the same contention: that the closing inventory for 1918 had been overvalued, that a correction of this overvaluation would result in an increase in cost of goods sold. The inevitable result of such an adjustment would be a reduction in net income.

The second claim in *Pacific Mills* was a reassertion of part of the first claim. Assuming, as the Circuit Court here does, that the second claim in this case was filed on "one of the grounds asserted in the first", the two cases are identical on the facts. The difference in the conclusion reached by the Courts in the two Circuits, therefore, calls for a review of this case by this Court to resolve this difference.

THE SECOND GROUND.

This case involves an important question of federal law which has not, but should be, decided by this Court.

The statute pertaining to the filing of claims for refund (R. S. §3228, as amended, 26 U. S. C. A. 1433; I. R. C. §3313, Appendix, p. 16) contains no limitation as to the number of refund claims which a taxpayer may file, nor does any other statute. The statute pertaining to the filing of suit upon disallowed claims (R. S. 3226, as amended, 26 U. S. C. A. 1672-1673, I. R. C. §3772, Appendix, p. 15) as it applies here, provides that no suit shall be maintained until a claim for refund or credit has been filed; that suit shall not be commenced before the expiration of six months after filing, unless the Commissioner prior thereto renders a decision on the claim, nor after the expiration of two years after disallowance, and makes provision for the effect of action by the Commissioner after disallowance.

Despite the silence of Congress on the point, the Bureau of Internal Revenue and the Courts have sought to limit the number of claims which a taxpayer may file. In *B. Altman & Co.* v. *U. S.*, 40 F. 2d 781, certiorari denied, 282 U. S. 863, the Court of Claims, and in the case at bar the Circuit Court, Second Circuit, held a second refund claim ineffectual. In *Pacific Mills* v. *Nichols*, 72 F. 2d 103, the Circuit Court, First Circuit, and in *Untermeyer* v. *Bowers*, 79 F. 2d 9, cert. den. 296 U. S. 641, the Circuit Court, Second Circuit, held a second claim effectual.

To add to the confusion, the Bureau of Internal Revenue, in a Solicitor's law opinion (L. O. 1116, Internal Revenue Bulletin, C. B. III-1, p. 350, set forth in part in Appendix, p. 17) states that the lan-

guage of R. S. §3228 (Appendix, p. 16) permits the filing of separate claims for refund of a single tax, so long as all claims are filed within the period prescribed for the filing thereof. Furthermore, in the administration of the statute, the Bureau raised no objection to the second claim. A reference to the copy of the second claim in the record (Pltff.'s Ex. "4" in Evidence, R. 53; Offered in Evidence, R. 36) shows that the second claim was received by the Collector (the receipt stamp); that it was numbered in regular course (see the number "ST 50075" on second page), that it was marked to show that a previous claim was filed (see the legend "Previous Claim See Cl. No. R22127" on second page); and that it was acted upon (see recommendation for rejection, and initials indicating examination and approval of claim, on the second page). Then the petitioner was given notice of disallowance, not however, because the claim was a duplication of a previous claim, but because the "test" case had not yet been decided by this Court (Pltff.'s Ex. "6" in Evidence, R. 56; Offered in Evidence, R. 39).

No argument need be made for the proposition that a definite decision upon the rights of taxpayers in revenue cases, and especially in refund cases, is important, both to the public and to the Government. While a statute of limitations performs a useful function in outlawing stale claims, the result of the operation of the statute deprives taxpayers of their rights. It is therefore extremely important that the law on this question be settled.

The rulings and practice in the Bureau of Internal Revenue, and the absence of a prohibition in the applicable statutes on the one hand, opposed to certain Court decisions on the other, point to the need for a decision of this Court to settle a question which has never thus far been considered by it.

THE THIRD GROUND.

The petitioner contends that the Circuit Court failed properly to consider the question for two reasons.

(a)

The Circuit Court based its opinion, in part at least upon so much of R. S. 3226, as amended, 26 U. S. C. A., Int. Rev. Code, §3772 (Appendix, p. 15), as reads:

> "consideration, reconsideration, or action by the Commissioner with respect to such claim following the mailing of a notice by registered mail of disallowance shall not operate to extend the period within which suit may be begun."

This part of R. S. 3226 has no application to this case. This action is based upon the refund claim filed on February 4, 1937, and rejected August 4, 1937 (R. 6). The action was begun January 10, 1939, within the two year period prescribed by statute for filing suit on that claim. The claim was not, nor was it intended by the taxpayer, or considered by the Commissioner, as an application to consider, reconsider or take any action upon the first claim. Yet the Circuit Court treats the second claim as if it were an application to reconsider the first.

(b)

The Circuit Court ignored completely the findings of fact of the District Court on the question of whether the two claims for refund were different

claims. In its findings of fact (R. 80, 81, 84) the District Court found:

> "11. That the said claim for refund filed on the 15th day of January, 1935 was filed upon the theory that jig-saw puzzles manufactured by plaintiff were children's games.
>
> "12. That the claim for refund filed on the 4th day of February, 1937 was filed upon the theory that jig-saw puzzles manufactured by plaintiff were not games; that said puzzles were contrivances for testing ingenuity or skill, and upon the basis of the decision of the United States Circuit Court of Appeals for the First Circuit in the case of *Philip J. Aronson, Trustee, plaintiff-appellant* v. *Thomas W. White, appellee* (No. 3171), decided January 5, 1937."

Under the Federal Rules of Procedure, Rule 52 (Appendix, p. 18), findings of fact shall not be set aside unless clearly erroneous. The Circuit Court, by its very statement of the question in the case in the first paragraph of its opinion not only overlooks the findings, but ignores without explanation the contention of the petitioner that the first and second claims were filed upon different grounds. As the District Court pointed out in its opinion (R. 71, 72), the second claim was based upon the decision of the Circuit Court of Appeals in *Aronson* v. *White*, 87 F. 2d 272, aff'd 302 U. S. 16, a basis not set forth in the first claim. The second claim, furthermore, was disallowed for the sole reason that this Court had not yet passed upon the *Aronson* case, and no other. In addition, the claims differed because (1) the first claim did not state the amount claimed; the second did

(Deft.'s Ex. "A" in Evidence, R. 57; Offered in Evidence, R. 40; Pltff.'s Ex. "4" in Evidence, R. 53; Offered in Evidence, R. 36); (2) the first claim was based upon the principal contention that jig-saw puzzles were children's games, a fact not relied upon in the second claim, and (3) the second claim included an item of $67.01 of tax not claimed in the first claim (R. 61). The Circuit Court apparently completely disregarded the findings of the Court below, and the items of difference between the two claims. This is apparent from the statement of the question in the opinion of the Circuit Court (*Einson-Freeman Co.* v. *Corwin,* 112 F. 2d 683).

CONCLUSION.

Because the question here was decided differently by the Circuit Courts in two Circuits, because the question is a question involving the Internal Revenue Laws which ought to be decided and settled by this Court, and because it appears that the Circuit Court apparently departed from the accepted course of judicial proceedings, it is requested that the petition for a writ of certiorari be granted.

Respectfully submitted,

DANIEL GORDON JUDGE,
Attorney for Petitioner.